93-233

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1992

LINA CALVENTO,

Petitioner,

vs.

BELLI & SABIH, BANKS & LEVITON, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

LINA P. CALVENTO
546 South Normandie #5
Los Angeles, California 90020
(213) 738-7113

Petitioner In Pro Per

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Questions Presented

1. Does *Code of Civil Procedure* § 340.6 effectively impair contracts, and amount to a Bill of Attainder as recognized and forbidden by Article I, § 10 of the U.S. Constitution?

2. Did dismissal(s) deprive petitioner of her property—her suit and her right to due process as recognized and guaranteed by the Fifth Amendment to the U.S. Constitution?

3. Was (were) same dismissal(s) in violation of Article VI of the U.S. Constitution and their respective state constitution(s) (or was same merely in error, yet with the same effect as a violation)?

4. Does the *California Code of Civil Procedure* § 340.6—a statute of repose unconstitutionallly discriminate because it represents an unreasonable and arbitrary legislative classification favoring a particular class of defendants (in violation of the Fifth Amendment to the U.S. Con-

stitution recognizing and guarantying due process and equal protection; the Ninth Amendment to same which recognizes any and all rights of the people, enumerated or not—including, but not limited to the rights of association, disassociation, and the right to have any and all legislation to be of compelling state interest and in the interests of justice, the general welfare, and of liberty—freedom; plus Article I, § 11 (uniform operation of laws) and Article I, § 21 (enumeration of rights clause) of the Constitution of the State of California (1849)—and/or their respective articles with the California State Constitution of 1879)?

List of Parties

The parties to the proceedings below were the petitioner Lina Calvento and the respondents Belli & Sabih and Banks & Leviton, Inc.

Contents

Authorities iii

Opinions Below 2

Jurisdiction 3

Statutes Involved 5

Is C.C.P. § 340.6 Constitutional? 7

Contractual Impairment 12

Right to Disassociate 14

340.6 does not provide "equal protection." 15

340.6 creates a special class. 15

Insufficient rationale exists for such a distinction and the legislature have no compelling state interest. 16

340.6 is a "bill of attainder." 19

Was Dismissal Erroneous? 20

The trial court committed reversible error by dismissing Lina's lawsuit, for three independent reasons. 20

The uncontradicted evidence shows that the trial court's order of dismissal was based upon the wrong statute. 20

Conclusion 26

Appendix A 27

Appendix B 28

Certificate of Service 39

Authorities

Cases

Allied Structural Steel v. Spannaus,
438 U.S. 234 (1978) 8,13

Henderson Clay Products v. Edgar Wood & Associates, Inc.,
122 N.H. 800,
451 A.2d 174 (1982) 8

Jacobson v. Massachusetts,
197 U.S. 11, 31 (1905) 8,15

Kupka v. Board of Administration,
122 Cal. App. 3d 791, 797,
176 Cal. Rptr. 214 7

Liggett Co. v. Baldridge,
278 U.S. 105 (1928) 8

Ocean Shore R.R. Co. v. Santa Cruz,
198 Cal. App. 2d 267, 273,
17 Cal. Rptr. 892 (1981) 7

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 9,14

Tulsa Collection Servs. v. Pope,
485 U.S. ___,
108 S. Ct. ___,
99 L. Ed. 2d 565 (1988) 8

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977) 9,13

Wilson v. Iseminger,
185 U.S. 55,
22 S. Ct. 573 (1902) 8,12

Statutes

Code of Civil Procedure § 338-340 9
Code of Civil Procedure § 340.6 5,7,9,10
Code of Civil Procedure § 583.320 6
Code of Civil Procedure § 583.340 6
28 U.S.C. § 1257 ..... 3, 4

Constitution(s)

U.S. Constitution
Article I, § 10 12
Fifth Amendment 15
Fourteenth Amendment 15

Other Authorities

Handbook of the Law of Torts, § 30, (4th ed. 1971) ...8,11

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The petitioner Lina Calvento respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second District, entered in the above-entitled proceeding.

Opinions Below

The opinion of the California Court of Appeal for the Second Appellate District is not reported or published. The opinion is reprinted in Appendix A.

The summary denial of the Petition for Review to the California Supreme Court has not been reported. It is reprinted in Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review decisions of the state courts is codified in 28 U.S.C. § 1257, which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.

Invoking state court jurisdiction, the petitioner brought this suit in the Los Angeles County Superior Court, on September 12, 1984. On July 7, 1988 the trial court dismissed the action. Petitioner timely appealed. The order of dismissal was reversed. The case was again dismissed on February 8, 1991. Petitioner timely filed an appeal which affirmed the dismissal order. A petition for review was filed with the California Supreme Court. The Supreme Court denied the Petition for Review summarily. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the California Supreme Court is invoked under 28 U.S.C. § 1257.

Statutes Involved

Code of Civil Procdedure § 340.6 reads:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
>
> (1) The plaintiff has not sustained actual injury;
>
> (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
>
> (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
>
> (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
>
> (b) In an action based upon an instrument in writing, the effective date of which depends upon

some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

Code of Civil Procedure § 583.340 reads:

> In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
>
> (a) The jurisdiction of the court to try the action was suspended.
>
> (b) Prosecution or trial of the action was stayed or enjoined.
>
> (c) Bringing the action to trial, for any other reason, was impossible, impracticable or futile.

Code of Civil Procedure § 583.320 reads:

> (a) If a new trial is granted in the action the action shall again be brought to trial within the following times:
>
> (1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.
>
> (2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.
>
> (3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

Is C.C.P. § 340.6 Constitutional?

As will be enumerated below, the infirmities found in *Code of Civil Procedure* § 340.6 are repugnant to the constraints of the *United States Constitution* on numerous grounds. The authority of the Legislature to provide periods of limitation is unquestionable, and the fixing of time limits within which particular rights must be asserted is a matter of legislative policy. The only restriction of the legislature's authority is that a statute of limitation must not be so manifestly inequitable as to amend to the denial of justice.[1] When a statute of limitations is not self-executing and operates to limit a cause of action that amounts to a property interest, it violates due process if it does not provide—due to vagueness—actual notice of

[1] *Ocean Shore R.R. Co. v. Santa Cruz*, 198 Cal. App. 2d 267, 273, 17 Cal. Rptr. 892 (1981); *see also Kupka v. Board of Administration*, 122 Cal. App. 3d 791, 797, 176 Cal. Rptr. 214.

the limitations period.[2]

There is a distinct difference between "accrual" of an action and "limitations" of actions. The distinction begin that accrual commences when all of the elements of a cause exist, and limitations commence after a cause accrues. The limitation defense is dependent upon accrual of action and existence of each element. As such, a limitation statute must not destroy a cause—and with it a constitutional right (e.g. a right to a jury trial)—prematurely (*Handbook of the Law of Torts*, § 30, p. 143 (4th ed. 1971). A statute must not bar an opportunity to exercise any existing rights by disallowing a reasonable amount of time (*Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573 (1902). Any special legislation must be necessary and directed towards a compelling state interest (*Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978); *Lochner v. New York*, 198 U.S. 45, 56, 64 (1905); *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905); and *Liggett Co. v Baldridge*, 278 U.S. 105, 111 (1928). Statutes of repose must not be unconstitutionally discriminatory (*Henderson Clay Products v. Edgar Wood & Associates, Inc.*, 122 N.H. 800, 451 A.2d 174, 175 (1982)). Contracts must

[2] *Tulsa Collection Servs. v. Pope*, 485 U.S. ___, 108 S. Ct. ___, 99 L. Ed. 2d 565, 575-577, 579 (1988).

not be impaired by legislation (*United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). And we the people of these United States must not be unduly restricted in exercising our right to associate and disassociate freely in personal relationship, nor should legislation be enacted for the special associational protection of clubs that affect our economic life (*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

Code of Civil Procedure § 340.6 only allows a one-year statute of limitation after accrual in poperty matters–where an attorney is the root cause –while *Code of Civil Procedure* § 338-340 (the general statute for property loss) allows for at least a three-year statute of limitation on property matters—where an attorney is not the root cause of the property damage or loss. In other words, the California Legislature believes it to be reasonable, necessary, and of compelling state interest that property loss matters require up to three years time (after accrual) to process unless a plaintiff's former attorney is implicated in the matter –then a mere one-year limit is deemeed sufficient.

Thus, attorneys are clearly—and unduly—being granted a favored legal status among the people of the state through *Code of Civil Procedure* § 340.6, because the attorneys benefit as defendants when the time given to sue against them is cut to

a third of that given to plaintiffs to sue others (not attorneys) over similar matters. This Code breaches both (explicit) due process and (implicit) equal protection rights— possessed by the people—as found in (the intent of) the Constitution for the United States of America (1787) and in this state's (1849 common law and 1879 corporate) constitutions.

FDurthermore, with respect to *Code of Civil Procedure* § 340.6, impairment or inducement of several contractual relationships exists which add an unnecessary strain to the exercise of one's right of association and disassociation. A contract between an attorney and his client is impacted since such a contract determines when the statute commences. A litigant should be free to exercise his contractual and associational rights, absent a statute penalty—such as the commencment of a (highly variable, and thus vague) limitations statute.

By this Code, if one needs appellate work done, then one may be coerced into accepting one of the following circumstances: (1) retaining the poor attorney--who may not be competent for appellate work—and thereby risk one's case; (2) find a specialized appellate attorney to replace the incompetent attorney, thereby starting the shortened limitation period in which to take action against the poor attorney who caused

damages; (3) find a second attorney while retaining the first so that the short limitation period does not begin—thus incurring great (and otherwise unnecessary) expense and risking a potential conflict between the two attorneys when the malpractice of the first is made known to the second; (4) drop the corrupt and/or negligent attorney and thus face the shortened, one year limitation period (and risk abdicating one's right to action pending appeal), without counsel. Remember that in other property matters one may associate and disassociate freely with attorneys without any added, compelling strain (such as a more restrictive time constraint or an extra financial burden) which impairs attorney-client contracts.

As Prosser eloquently states:

> Surely then, the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action.

Handbook of the Law of Torts, § 30, p. 143 (4th ed. 1971). This Court further articulated the prohibition against arbitrary limitation of actions:

> ... it may be properly concluded that all statutes of limitations must proceed on the idea that the

> party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. ...

Wilson v. Iseminger, 185 U.S. 55, 22 S. Ct. 573 (1902). Even if the legislature had sufficient rationale for 340.6, the holding in *Wilson* precludes its application as arbitrary.

Contractual Impairment

Proscriptions of contractual impairment are contained in the *United States Constitution*, Article I, § 10, and commands that no state shall pass any law impairing the obligation of contracts.

The protective shield of the contracts clause is directly applicable in this instant. The contracts between the client and attorney(s) are impacted and such a contract determines whether the statute commences. In other words, if the client terminates the relationship with the attorney the clock ticks. If the client maintains the contractual relationship, the clock

does not tick. This would induce any rationale human being to preclude firing their attorney for fear of abdication of their right to action pending appeal.

This Court dusted off the contracts clause and put it to use in *United States Trust Co. of New York v. New Jersey* in 1977.[3] If further expanded its scope in 1978 in its opinion in *Allied Structural Steel v. Spannaus.*[4] In those decisions this Court avoided the words "strict scrutiny," seems to have applied just such an exacting standard of review to the Minnesota law by invoking the "compelling state interest" and "necessary means" tests.[5]

In applying the holdings to the instant action, the contracting parties must have certain expectations that cannot be disrupted. When a person contracts with an attorney, the right continues throughout. A person also has the right to retain any attorney he or she chooses at any time. If a litigant wishes to retain specialized appellate attorneys, he or she should be free to exercise his contractual and associational rights, absent a statute penalty.[6] On the flip side, if the attorney does not

[3]431 U.S. 1 (1977).

[4]438 U.S. 234 (1978).

[5]See, e.g., 438 U.S. at 242, 247 ("Yet there is no showing ... that this [Act] was *necessary* to meet an *important* general social problem.") (emphasis added.)

[6]In this case the penalty is the ticking of the clock of *Code of Civil*

do appellate work the desire of the client to contract with that attorney is impaired for fear of the hstatute expiration, regardless of the trial attorney's competency. Also, the client's right to terminate the contract is impaired in that, with the statute ticking, the client is coerced into continuing the relationship despite desires otherwise.

Right to Disassociate

Justice Brennan's opinion for this Court in *Roberts v. United States Jaycees*,[7] after recognizing the "the Bill of Rights ... must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State," described the intrinsic valude of these relationships and, in the course of denying special associational protection to clubs that affect economic life. Along with the associational rights enjoyed by the people, the right to disassociate is equally protected.

With respect to 340.6, impairment or inducement of several contractual relationships exist and cannot be tolerated. First, the right to disassociate with the attorney is impaired in light of the statute. Further, if the client wishes to appeal, the current

Procedure § 340.6.

[7]468 U.S. 609 (1984).

attorney must associate in another specialist, while maintaining his own relationship. Third, the existence of the relations between the associated appellate specialist and the trial attorney is forced even in light of a portential conflict if discovery of the malpractice is made by the appellate attorney. A litigant cannot be influenced by 340.6. A party must be free to associate and disassociate without impendance. Therefore 340.6 is unconstitutional.

340.6 does not provide "equal protection."

340.6 creates a special class.

This Court in Lochner v. New York,[8] *Jacobson v. Massachusetts*,[9] *Liggest Co. v. Baldridge*,[10] created the quintessential litmus test to determine sufficient state interest and its inherent police power. These cases involved analysis of state legislation in light of the Fifth[11] and Fourteenth[12] Amendments.

Upon comparison of the instant statute of repose and the

[8] 198 U.S. 45, 56, 64 (1905).

[9] 197 U.S. 11, 31 (1905).

[10] 278 U.S. 105, 111 (1928).

[11] No person shall ... be deprived of life, liberty, or property, without due process of law; ...

[12] No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

facts contained in *Lochner, supra*, § 340.6 clearly falls with the purviews of a "suspect class."

Insufficient rationale exists for such a distinction and the legislature have no compelling state interest.

A general statute for property loss is contained in *Code of Civil Procedure* § 338-340. The legislature may enact special legislation only if there is a compelling state interest.

Statutes of repose may deny equal protection of both state and federal constitutions. For instance, a statute of repose barring suits against architects brought more than six years after the completion of the performance of the architectural services was held to violate the equal protection clauses of both the fedearl and the New Hampshire constitutions.[13] Citing several cases, this Court stated its rationale:

> We adopt the view shared by those jurisdictions that hold similar distinctions immunizing architects are unconstitutionally discriminatory because they

[13] *Henderson Clay Producteds v. Edgar Wood & Associates, Inc.*, 122 N.H. 800, 451 A.2d 174, 175 (1982). The cases cited by this court were: *Fujioka v. Kam*, 55 Hawaii 7, 12, 514 P.2d 568, 571-572 (1973); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N. E. 2d 588 (1967); *Loyal Order of Mouse, Lodge 1785 v. Cavaness*, 563 P.2d 143, 148 (Okla. 1977); *Broome v. Truluck*, 270 S.C. 227, 230, 241 S. E. 2d 739, 740 (1978); *Kallas Millwork Corp. v. Square D. Co.*, 66 Wis. 2d 382, 383, 225 N.W.2d 454 (1975). The court in *Tabler v. Wallace*, 704 S.W.2d 179, 182 n.4 (Ky. 1985), cited a variety of federal and state cases that addressed the equal protection arguments related to statutes of repose.

> represent an unreasonable and arbitrary legislative classification favoring a particular class of defendants.

The Kentucky Supreme Court had to determine whether a statute of repose shortening architects statute of repose violated the equal protection provisions. Another case on point is *Overland Const. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979).[14]

> The only apparent basis for the present legislation is that a special class, builders, architects and engineers involved in construction, faced with a growing exposure to litigation, lobbied for a statute limiting their liability. There is no social basis presented to justify a special class, only their own self-interest. Other groups similarly situated do not share in their legislative windfall. Their subjective reasons will not withstand public policy analysis.[15]

The legislature stated its intent was to lower insurance premiums for legal malpractice (erros and omissions). The monetary interests of one suspect class is not sufficient reason to abridge the public's access to the courts for injury cased by the very attorneys. In any event, the special legislation must fall in light of the overriding general statute of repose found in §§ 338-339 granting either three or four years to sue for property loss.

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[14] In that case, the legislative rationale was to lower insurance premiums citing it was in the best interests of the public. Such rationale did not fly under the miscroscope of constitutional analysis.

[15] *Id.* at 180-187.

Even if the statute was not arbitrary, it does not treat persons similarly situated alike. Persons who suffer property loss, other than clients of attorneys, enjoy the application of C.C.P. §§ 338-339, whereas, merely being a client of an attorney mandates filing for property loss within one year as opposed to three (or four) years.

For sake of analogy, a brother and sister reatin the same counsel to represent them in a wrongful death action regarding their mother. The attorney commits malpractie and the wrongful death action is dismissed. The attorney volunteers to appeal the dismissal. The sister, for whatever reason, decides to seek other counsel, 340.6 commences the clock ticking in her ear for merely exercising her constitutional right to disassociate. The brother may remain with the attorney for years pending appeal. The one-year statute for the sister starts on the date of disassociation, whereas the brother can ride out the appeal before his statute begins to run. Same fact situation, different result. The malpractice was committed at the same time against the clients, yet each have a different statute time period depending on whether they exercise other constitutional rights. This is untenable and unconstitutional.

340.6 is a "bill of attainder."

Prosections of attander bills in whatever form is contained in the *United States Constitution*. Article I, § 9.[16] Even though most decisional law dealing with attainder issues deal with criminal states, civil statutes may also be impacted. In short, 340.6 is a bill of attainder in that it penalizes a party for exercising his constitutional rights of association, disassociation, contract, petition, etc. Penalties for exercising rights is analogous to Soviets refusing to assert free speech out of fear of prosecution. Any chilling effect upon the exercise of a constitutional right(s) must be eliminated.

[16] No bill of attander or ex post facto law shall be passed.

Was Dismissal Erroneous?

The trial court committed reversible error by dismissing Lina's lawsuit, for three independent reasons.

The uncontradicted evidence shows that the trial court's order of dismissal was based upon the wrong statute.

To determine when Lina—the petitioner—had to file her lawsuit, it must be determined when accrual began. Only then can we determine when it should have been brought to trial and not dismissed under some statute of limitations.

Lina asserts that the court prematurely and erroneously dismissed her action under the five-year statute of limitations.[17] The plaintiff has brought her case to trial thereby invoking the three-year statute to bring the action to trial.[18]

[17] *Code of Civil Procedure* § 583.310.
[18] *Code of Civil Procedure* § 583.320(a)(3).

Under the California Supreme Court's ruling in *Laird v. Blacker*, 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P. 2d 691 (1992), the statute commences on adverse judgment regardless of appeal. *Civil Code* § 312 mandates that a cause of action remains existent during appeal, despite the adverse trial court judgment. Only after a remittitur issues does the cause of action merge with the judgment. Property loss occurs when the cause of action merges with the judgment. Therefore, a statute of limitations commences before the cause of action arises, thereby depriving appealing litigants their right to redress their grievances.

The action was "brought to trial" within five years, therefore the three-year statute began to run.

For purposes of the five-year statute of limitations, "trial" includes the determination of any issue of fact or law which brings the action to the stage where final disposition can be made.[19] Thus, if a judgment (order of dismissal) has been granted pursuant to some pre-tiral motion, a "trial" has occurred ... so that there is no further problem with the five-year statute if

[19] *Lemaire, Faunce & Katznelson v. Cox*, 171 Cal. App. 3d 297, 217 Cal. Rptr. 281 (1985).

that judgment (order of dismissal) is later reversed on appeal.[20]

Defendants filed a pre-trial motion to dismiss three years after the filing date of the complaint. A judgment of dismissal was enterd which finally disposed of her case. Therefore, since an order of dismissal (judgment) was granted pursuant to defendants' pre-trial motion, a "trial" occurred.

Even if an appellate court reversed and remands without specifically ordering a "new trial," it is common law that a reversal and remand automatically commands a new trial. Appellant's action was reversed and remanded (C.T. 252, 323, 338), and a new trial ordered (tacitly or impliedly).

Based upon *Code of Civil Procedure* § 583.320(a)(3) and 583.420(a)(3), Lina's three-year statute began running on the remittitur date (March 15, 1990). The last day to bring the action to trial was March 15, 1993. The trial court erroneously dismissed the action in February of 1991, over two years too early.

The error was "prejudicial" because Lina was denied her right to trial. Less than one year had transpired since the remittitur was entered, leaving plaintiff with more than two

[20] *McDonough Power Equip. Co. v. Superior Court*, 8 Cal. 3d 527, 532, 105 Cal. Rptr. 330, 333 (1972).

years remaining to bring her case to trial (re-trial). Lina has been prejudiced by the denial of the trial court of her right to trial by jury.

Even if this court finds the five-year statute applicable, the five-year date was miscalculated where time was remaining for plaintiff to bring her case to trial.

To calcuate the five-year statute, several occasions exist which toll the period of time[21] during which:

The court's jurisdiction to try the action was suspended. The five-year statute is extended for any period of time during which the court's jurisdiction to try the case was suspended. "Suspended jurisdiction" is interpreted expansively, so that the five-year statute is tolled during an appeal.[22] There is no time limit on the extension where the court's jurisdiction is suspended. The five-year period is extended as long as the court lacks jurisdiction to try the case.[23]

Lina's action was dismissed on September 1, 1988, at which time the court lost jurisdiction (with the exception of collateral

[21] See *Code of Civil Procedure* § 583.340.

[22] *Bergin v. Portman*, 141 Cal. App. 3d 23, 190 Cal. Rptr. 81 (1983).

[23] *Herring v. Peterson*, 116 Cal. App. 3d 608, 172 Cal. Rptr. 240, 242 (1981).

matters).[24]

Bringing the action to trial, for any other reason was "impossible, impracticable or futile. The five-year statute is also tolled where it was "impossible, impracticable or futile" to bring the action to trial.[25] The plaintiff must present clear and convincing evidence showing it was "impossible, impracticable or futile" to bring the matter to trial within five years.[26] It is Lina's responsibility to inform the court of the approaching five-year or three-year statute deadline. A formal motion for trial preference should be made, in the least.[27]

Lina gave the court numerous instances that her alleged five-year statute was approaching. She filed a Statute Calculation [sic] (Notice of Calculation of Statute of Limitations) on April 11, 1990 (C.T. 403), several At-Issue Memorandum (C.T. 80, 727), several motions or application to specially set trial date (C.T. 650, 832, 1108), which all informed the court of

[24] Although a judgment of dismissal has been entered, the court still has jurisdiction to determine matters ancillary to the underlying action, such as costs and attorneys' fees. *Maria P. v. Riles*, 43 Cal. 3d 1281, 240 Cal. Rptr. 872 (1987); *Code of Civil Procedure* § 1021.5 (private attorney general fees).

[25] *Code of Civil Procedure* § 583.340(c).

[26] *Hoffman v. State of California*, 171 Cal. App. 3d 110, 1108, 217 Cal. Rptr. 867, 872 (1985).

[27] *Wale v. Rodriguez*, 206 Cal. App. 3d 129, 253 Cal. Rptr. 382 (1988) [requirement that formal motion be made].

the nearing statute. Plaintiff was constantly vigilant in her efforts to inform the court of the alleged statute date and obtain a trial date before any statute ran. (R.T. 2-57).

It was also "impracticable" for appellant to bring her action to trial while the underlying action (the worker's compensation case) was pending, the outcome of which may be determinative of plaintiff's action.

Even if the five-year date was approaching, plaintiff did everything in her power to obtain a trial date and was prevented by the trial court's breach of of its mandatory duties. The trial court has an affirmative duty, once put on notice of the five-year trial statute, to cause a trial date to be set and to cause the first date of trial to commence before the running of the statute. To do otherwise is a breach of the trial court's obligations and renders compliance with the five-year statute impossible, impracticable, and futile. Hopefully this court will see that the trial court did everything in its power to deprive Lina of her day in court, in violation of the trial court's mandatory duties.

Conclusion

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Petitioner In Pro Per

Appendix A

Second Appellate District, Division Three. No. B057251
S031818

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LINA CALVENTO, Appellant

v.

CHARLES R. METCALFE et al., Respondents

Appellant's petition for review DENIED. The request for an order directing publication of the opinion in the above entitled cause is denied.

/s/ LUCAS
Chief Justice

Appendix B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LINA CALVENTO,	)	B 057251
	)	(Super.Ct.No. C 514745)
Plaintiff and Appellant,	)	
	)	COURT OF APPEAL SECOND DIST
v.	)	FILED
	)	FEB 28, 1993
CHARLES R. METCALFE, et al.,	)	
	)	Joseph A. Lane Clerk
Defendants and Respondents.	)	
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APPEAL from a judgment of the Superior Court of Los Angeles County. Judith Chirlin, Judge. Affirmed.

Lina Calvento, In Pro. Per., for Plaintiff and Appellant.

Kevin Rose on behalf of Plaintiff and Appellant.

Simon, McKinsey, Miller, Zommick, Sandor & Dundas, Kenneth Zommick, Sherry Anne Lear; Haskell Shapiro, in Pro. Per., for Defendants and Respondents.

Plaintiff Lina Calvento ("plaintiff") appeals from an order of dismissal which was granted to defendants after the trial court determined that plaintiff had failed to bring her case to trial within five years of its filing. We find there was no error in the trial court's ruling and we affirm the dismissal.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff filed this action on September 18, 1984, alleging a single cause of action for professional malpractice. Named as defendants were several attorneys and law firms. The complaint was amended several times thereafter due to demurrers being sustained.

Certain of the defendant attorneys and law firms moved for dismissal of the case, contending that plaintiff had failed to serve them within three years, as she was required to do by Code of Civil Procedure section 583.210.[28] Their motions were granted and the court entered orders of dismissal on October 7, 1988 as to those defendants (hereinafter "defendants"). On

[28] Unless otherwise indicated, all statutory references herein are to the Code of Civil Procedure.

that same day, plaintiff filed a notice of appeal from the orders, which were reversed by Division Four of the Second Appellate District. The remittitur issued February 20, 1990.

At a status conference held October 12, 1990, defendants indicated to the court their belief that the case had to be brought to trial by February 1, 1991. At another conference on December 19, 1990, plaintiff indicated to the court that the five-year limitations date was approaching; the defendants again indicated to the court their belief that trial must commence by February 1, 1991. The trial court set discovery and law and motion cut off dates and a trial date of April 22, 1991.

On January 14, 1991, the trial court heard plaintiff's motion to specially set the case for trial. The court indicated it would deny the motion, based on (1) a lack of diligence by the plaintiff in moving her case forward and (2) prejudice to the defendants. Regarding such prejudice, the court noted that the circumstances allegedly giving rise to the action happened "a long time ago" and also noted that defendants still needed to conduct discovery. (Defendants spent much of the five years trying to get plaintiff to file an amended complaint which they could comprehend, so that they could focus their discovery.) Regarding plaintiff's lack of diligence, the court observed that

plaintiff had taken two years and 364 days to serve the defendants and had necessitated numerous demurrer hearings because her complaint and amended complaints were uncertain.

The court invited defendants to bring a motion to dismiss which would be based on the statute which requires a plaintiff to bring her case to trial within five years of its filing (§ 583.310). In that manner, there would be a vehicle for making a determination of when plaintiff's five years would run. Defendants indicated they would do so and the court set February 8, 1991 as the hearing date for their motions. Motions to dismiss were then filed by the defendants and granted by the trial court. The order of dismissal was signed and filed February 13, 1991. On March 8, 1991, plaintiff filed a notice of appeal from that order.

DISCUSSION

1. The Proper Time Limit for Bringing the Case to Trial

On appeal, plaintiff challenges application of the five-year statute to her case. Plaintiff contends that (1) the erroneous prior dismissal of her case (for failure to serve defendants within three years) constituted a "trial"; (2) this "trial" warrants our application of the three-year time limit in section 583.320 for

bringing a case to a new trial after it is remitted from a reviewing court;[29] and (3) application of the three-year statute shows that she has until March 15, 1993 to bring this case to trial. However, all three portions of this contention are without merit; a similar argument was rejected in Fannin Corp. v. Superior Court (1974) 36 Cal.App.3d 745.

2. The Trial Court's Calculation of Time

Plaintiff next argues that even if the original five-year limit for bringing her case to trial applied after the court of appeal issued its remittitur, dismissal of her case under the five-year rule was not proper because the trial court miscalculated the day on which trial had to begin. Plaintiff is wrong.

The five years begin running on the day she filed her case – September 18, 1984. By October 7, 1988, the day she filed her notice of appeal from the first dismissal of her case, four years and 19 days of the five years had run. Thus at that point in time, she had just 19 days short of a year to bring her case to trial. Running of the five-year statute was suspended from October 7, 1988 to the issuance of the remittitur on February 20, 1990 because it was impossible for plaintiff to bring her case

[29]Section 583.320 provides that if a judgment is reversed and a case remanded for new trial, the case must be brought to trial within three years after the remittitur is filed by the clerk of the trial court.

to trial during that time. (Fannin Corp. v. Superior Court, supra, 36 Cal.App.3d at p. 750.) Once the remittitur issued, plaintiff again had just 19 days short of a year to bring her case to trial. She did not do so and therefore granting a five-year dismissal on February 8, 1991 was a proper thing for the trial court to do.

We reject plaintiff's contention that just because she informed the court that the five-year statute was about to run and just because she made a motion to specially set, the court should have set the case for trial. Plaintiff's motion was heard less than a month before the five-year statute was to expire. The court fully explained to plaintiff that she had put herself in a bind with respect to the five-year statute because she had delayed in serving the defendants and because her various attempts at writing a coherent complaint had all failed and had necessitated numerous valid demurrers, all of which took time. The court explained to her that it would not set a date for trial just to accomodate her, noting that the defendants had not as yet had time to do their discovery.

It is not surprising that plaintiff cited no authority for her assertion that "The trial court has an affirmative duty, once put on notice of the 5-year trial state, to cause a trial date to

be set and to cause the first date of trial to commence before the running of the statute. To do otherwise is a breach of the trial court's obligations and renders compliance with the 5-year statute, impossible, impracticable, and futile." That assertion is absurd; it implies that a plaintiff can be as dilatory as she likes in moving her case along and then still obtain a trial date whenever she likes, no matter how prejudicial that date is to the other litigants in her case and to others waiting to have their cases heard.

3. The Contention that the Case Has Been Brought to Trial

Plaintiff argues that if the five-year statute applies, she has met it because she already brought her case to trial in that a pretrial dismissal of an action constitutes a trial. As noted above, this contention was rejected in Fannin Corp. v. Superior Court, supra, 36 Cal.App.3d 715.

4. Plaintiff's Worker's Compensation Claim

According to the "statement of the case" portion of plaintiff's briefs, the instant action for malpractice is based on defendants' alleged mishandling of her worker's compensation case. Plaintiff contends that even if the five-year statute applies to her case, under section 583.340 that statute was tolled during the time that her worker's compensation case worked its way

through the appellate process. She also contends that "statutes are equitably tolled under ... section 339 [two-year statute of limitations for oral contracts] until actual loss of [sic] damage."

The problem with these contentions is that they are being made in a vacuum because plaintiff has not set out in her brief, (with appropriate supporting references to the record), the facts associated with her worker's compensation case and with the way that case was handled by the defendants. Thus, we have no way of knowing whether these statutes even apply to her case, much less whether they apply in her favor. Setting out the law in a brief is not sufficient; the law must be applied to the relevant facts. Since plaintiff has chosen to keep us in the dark regarding the facts to which she asserts sections 339 and 583.340 apply, we can go no further here.

5. The Constitutionality of Section 340.6

Plaintiff argues that section 340.6, (the provision which provides for a one-year statute of limitations in actions for legal malpractice), is unconstitutional. Apparently the point of this contention is that if plaintiff had longer than a year to file her action, then dismissal under the five-year statute was premature.

The specific points made by plaintiff regarding the constitutionality of section 340.6 are discussed below. However, we note at the outset that we reject the whole of these points. Our rejection is based on two independent grounds: (1) plaintiff's arguments have no merit in and of themselves and (2) we do not know the facts of the underlying action and so cannot determine which of plaintiff's specific points have any connection to the instant case.

a. Accrual of Cause of Action

First, plaintiff appears to argue that section 340.6's provision for a one-year statute of limitations for attorney negligence inappropriately requires a person to sue her attorney before she has actually suffered a loss. The loss to which plaintiff refers is having a reviewing court affirm a judgment against her in the underlying action.

This issue was addressed in Laird v. Blacker (1992) 2 Cal.4th 606, where the court held that a cause of action for attorney malpractice accrues when the client suffers an adverse judgment since the client then is injured by having to appeal that underlying decision. Thus, the Laird Court concluded, the one-year statute of limitations for attorney malpractice is not tolled during the pendency of the appeal.

b. Impairment of Contractual Relations and Impingement on Right of Association

Next plaintiff appears to argue that, in violation of the federal and state constitutions, section 340.6 impairs the contractual relations between a client and her attorney. According to plaintiff, when a negligent attorney is fired by his client, the one-year statute of limitations for attorney negligence begins to run. Thus, the argument goes, the commencement of the running of the statute has the effect of making a client feel she should stay with her negligent attorney, even though she might prefer to be represented by another attorney. Plaintiff further appears to contend that this binding together of client and attorney violates a person's right to associate (and to not associate) with whom she pleases.

These contentions overlook the fact that under section 340.6 and Laird v. Laird v. Blacker, supra, 2 Cal.4th 606, the statute of limitations for attorney malpractice does not begin to run until the client is actually injured by the judgment against her or dismissal of her action.

c. Violation of the Equal Protection Clauses

Next, plaintiff argues that section 340.6 violates the equal protection clauses of the federal and state constitutions be-

cause section 340 already contains a statute of limitations for property loss and therefore section 340.6's provisions single out attorneys for special protection. However, we point out that section 340 contains a one-year statute of limitations, as does section 340.6.

6. Remaining Contentions

To the extent this opinion fails to address other specific points raised by plaintiff, said omission is not an oversight but rather represents the opinion of this court that the points raised do not merit discussion.

DISPOSITION

The order of dismissal appealed from is affirmed. Costs on appeal to defendants.

NOT TO BE PUBLISHED

CROSKEY, J.

We concur:

KLEIN, P.J. HINZ, J.

Certificate of Service

I, KEVIN ROSE, hereby certify that on August 10, 1993, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following: I further certify that all parties required to be served have been served.

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